Supreme Court, U.S.
FILED
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No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

JOINT APPENDIX

NORM MALENG
King County Prosecuting Attorney

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PETITION FOR WRIT OF CERTIORARI FILED JULY 13, 2005
CERTIORARI GRANTED OCTOBER 17, 2005

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Opinion of the Supreme Court of Washington dated April 14, 2005 ..... 1a

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 99-1-07833-7 SEA

STATE OF WASHINGTON,
Plaintiff,

v.

ARTURO R. RECUENCO,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/22/99	Original Information filed
12/23/99	Second Amended Information filed
1/10/00	Jury trial commenced
1/18/00	Third Amended Information filed
1/25/00	Court's instructions to the jury and verdict of jury finding defendant guilty as charged
2/24/00	Judgment and sentence of the court
2/29/00	Defendant's notice of appeal filed
7/28/03	Opinion of the Court of Appeals of Washington
4/14/05	Opinion of the Supreme Court of Washington

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 99-1-07833-7 SEA

THE STATE OF WASHINGTON,
Plaintiff,

v.

ARTURO R. RECUENCO,
Defendant.

INFORMATION

Filed September 22, 1999

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ARTURO R. RECUENCO of the crime of **Assault in the Second Degree**, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did intentionally assault Amy Recuenco with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: //s//
Kristin J. Chandler, WSBA #22684
Deputy Prosecuting Attorney

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

THIRD AMENDED INFORMATION

Filed January 18, 2000

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ARTURO R. RECUENCO of the crime of **Assault in the Second Degree**, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did intentionally assault Amy Recuenco with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant ARTURO R. RECUENCO at said time of being armed with a deadly weapon, to-wit: a handgun, under the authority of RCW 9.94A.125 and 9.94A.310.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse ARTURO R. RECUENCO of the crime of **Interfering with Domestic Violence Reporting**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Amy Recuenco, the victim of that crime and a witness to that crime, from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official;

Contrary to RCW 9A.36.150, and against the peace and dignity of the State of Washington.

COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse ARTURO R. RECUENCO of the crime of **Malicious Mischief in the Third Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant ARTURO R. RECUENCO in King County, Washington on or about September 18, 1999, did knowingly and maliciously cause physical damage to a kitchen stove, the property of Amy Recuenco;

Contrary to RCW 9A.48.090, and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: _____//s//_____
Jared C. Kimball, WSBA #25999
Deputy Prosecuting Attorney

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

STATE'S TRIAL MEMORANDUM

Filed January 10, 2000

I. CHARGE

The defendant is charged with one count of Assault in the Second Degree-Domestic Violence, with a Deadly Weapon Enhancement (handgun), one count of Interfering with Domestic Violence Reporting, and one count of Malicious Mischief in the Third Degree.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY
[Captions Omitted In Printing]

DEFENDANT'S PROPOSED JURY INSTRUCTIONS
(WITH CITATIONS)

Filed January 12, 2000

* * *

INSTRUCTION NO.

You will also be furnished with a special verdict form. If you find the defendant not guilty of Assault in the Second Degree do not use the special verdict form. If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

* * *

SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

Was the ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?

ANSWER: _____ (Yes or No)

_____
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

COURT'S INSTRUCTIONS TO THE JURY

Filed January 25, 2000

* * *

No. 8

To convict the defendant of the crime of assault in the second degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th of September, 1999, the defendant intentionally assaulted Amy Recuenco with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty as to Count I.

* * *

No. 9

The term "deadly weapon" includes any firearm, whether loaded or not.

* * *

No. 18

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree as alleged in Count I.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

No. 19

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and verdict forms.

You must fill in the blank provided in the verdict forms the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 20

You will also be furnished with a special verdict form. If you find the defendant not guilty of Assault in the Second Degree do not use the special verdict form. If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form and fill in the blank with the

answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM A

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUENCO [Guilty] (write in Not Guilty or Guilty) of the crime of Assault in the Second Degree as charged in Count I.

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM B

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUENCO [Guilty] (write in Not Guilty or Guilty) of the crime of interfering with Domestic Violence Reporting as charged in Count II.

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

VERDICT FORM C

Filed January 25, 2000

We, the jury, find the defendant ARTURO R. RECUENCO [Guilty] (write in Not Guilty or Guilty) of the crime of Malicious Mischief in the Third Degree as charged in Count III.

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

SPECIAL VERDICT FORM

Filed January 25, 2000

We, the jury, return a special verdict by answering as follows:

Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?

ANSWER: [YES] (Yes or No)

//s//
PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

JUDGMENT AND SENTENCE (Count I)

Filed March 2, 2000

I. HEARING

1.1 The defendant, the defendant's lawyer, Richard Pope, and the deputy prosecuting attorney were present at the sentencing hearing conducted today.

* * *

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on (date): 01-25-2000 by jury verdict of:

Count No.: 1 Crime: ASSAULT IN THE 2ND DEGREE
RCW 9A.36.021 1 C Crime Code: 01021
(a) Date of Crime: 09-18-1999 Incident No. ____.

* * *

SPECIAL VERDICT or FINDING(S):

(b) [ ] A special verdict/finding for being armed with a **Firearm** was rendered on Count(s) _____.
(c) [X] A special verdict/finding for being armed with a **Deadly Weapon** other than a firearm was rendered on Count(s) I

* * *

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	0	IV			3 TO 9 MONTHS DEADLY WEAPON 36 MONTHS 39-45 MONTHS	10 YRS AND/OR $20,000

* * *

4.4 CONFINEMENT ONE YEAR OR LESS: Defendant shall serve a term of total confinement in the King County Jail or if applicable under RCW 9.94A.190(3) in the Department of Corrections as follows, commencing: [ ] immediately; [ ] (Date): _____ by no later than _____.m.

__ [39]__ **months**/days on count ____I___;

* * *

Date: 2/24/00

_____//s//_____
JUDGE
Print Name: LAU

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

EXCERPTS FROM VERBATIM REPORT
OF PROCEEDINGS

DISCUSSION OF JURY INSTRUCTIONS

JANUARY 24, 2000

[796] THE COURT: Let's turn to the next one.

MR. POPE: Shall I call it No. 7 or dumb it back town to 6?

THE COURT: Why don't you call it your number 6.

MR. POPE: The one about intent, so the new number 6—

THE COURT: It is not new anymore, just number 6.

MR. POPE: No objection except as to legibility concerns.

Number 7 about knowingly, no objection except for legibility concerns.

Number 8, which is the Court's Assault 2 definition, no objections.

Number 9, I mean, what is the WPIC definition of that?

THE COURT: 2.06. It is right out of the WPIC.

MR. POPE: 2.06.01 says—

[797] THE COURT: Counsel, quite frankly there is no dispute in this case that we are talking about a gun, so there is no—I was just concerned that with the special verdict definition of deadly weapon it begins with "for purposes of," and tends to limit this instruction to the special verdict, and I wanted to be abundantly clear to the jury that the deadly weapon definition applies to the assault as well. So that is the

only reason I put it in there. They are almost near identical definitions.

MR. POPE: The problem I have with Instruction No. 9, the definition of deadly weapon, is a statutory definition, which is set forth in Instruction No. 2.06.

THE COURT: 0.01.

MR. POPE: 2.06.01 is a definition that is taken out of one particular case of *State v. Beaton*, 34 Wn. App. 125. While that case may have approved the use of that statement, the statutory definition of deadly weapon is contained in RCW 9A.04.110(6), which is in my proposed in my original instruction packet of No. 2.06, which I am limited to the issue of firearm, whether loaded or unloaded, which under the circumstances under which it is used, attempted to use, or threatened to be used, is readily capable of causing [798] death or substantial bodily injury.

THE COURT: Mr. Pope, the comments under 2.06.01 tell us that when the only weapon that is involved was a firearm, that 2.06.01 is just a simplified version. It is exactly the same as 2.06, except in this case there is no question that the only weapon in question is a firearm. It gives the jury just a simplified version of 2.06.

So is your objection that you don't want it, that you think 2.06.01 is not appropriate, nor is 2.06, that there should be no instruction, or are you saying that 2.06 is the appropriate instruction?

If you are saying that 2.06 is the appropriate instruction, it is not, because 2.06.01 tells us that if the only weapon involved is a firearm, as in this case, then the simplified version is the correct one to give them, because it is simple, simple, simple.

MR. POPE: Yeah, because it is—

THE COURT: Which is it? I am not clear what your objection is.

MR. POPE: I believe that my 2.06 does mention firearm and it is the only weapon, firearm, whether loaded or unloaded, and has the statutory language that is not bracketed in 2.06, which under [799] the circumstances in which it is used, attempted to be used, et cetera, and that is the language from 9A.04.110(6). I don't see the point in simplifying it any further.

There is no—my proposed instruction makes it clear that the deadly weapon in question is the firearm, not that some other kind of weapon might have been deadly. Simply states the statutory language of firearm.

THE COURT: I understand your objection.

Your next one, please.

MR. POPE: Okay. Number 10 I believe adequately applies.

Instruction No. 11 is my bodily injury instruction.

Instruction 12, there are a couple things about Instruction No. 12 aside from legibility concerns. As far as the domestic violence interfering goes, if we look at, for example, Instruction No. 14, the issue here is whether or not the defendant prevented or attempted to prevent Amy Recuenco from calling a 911 emergency communication system. So my definition and my proposed 35.—36.56 simply cut it off as attempt to prevent the victim or witness to the domestic violence crime from calling a 911 emergency [800] communication system.

The additional language about obtaining medical assistance or making a report to any law enforcement official contained two things that are not supported by the evidence and obviously are different than the to-convict instruction.

Obviously the issue is whether or not Mr. Recuenco attempted or prevented Ms. Recuenco from calling 911 as well as the other elements that must be satisfied to meet that. There isn't the issue about the other two methods of committing a crime, about the alternatives.

So I would propose after emergency communication system putting a period and striking the additional two comments.

THE COURT: I understand your objection.

And your next one, please.

MR. POPE: The next objection, obviously, was based upon the idea of having the lesser-included offense, which would be adding the words assault in the fourth degree, after assault in the second degree. I will give my arguments about the lesser-included offense a little bit later when I talk about things that I object to not being given.

Instruction 13 is the same that I proposed as [801] a definition of family household members.

Instruction 14 is acceptable, with the caveat that subsection (1) would need to have an assault in the fourth degree added if there is a lesser-included offense instruction given, but otherwise it would adequately define what the situation is, or the to-convict for this offense.

Instruction 15, malicious mischief definition, it is the same as mine, with my continuing concerns over legibility.

Instruction 16 is the same that I propose.

Instruction 17 is the same as instruction I proposed to convict of malicious mischief.

Instruction 18, and that is written by the Court, and—

THE COURT: Well, it is written by the WPIC committee.

MR. POPE: I know. It is proposed by the Court.

THE COURT: Correct. It is required by the WPIC instructions.

MR. POPE: I understand that. The instruction number is?

THE COURT: 18.

MR. POPE: I know. The WPIC number.

[802] THE COURT: 207.02.

MR. POPE: It seemed to accurately reflect what 207.02 would be. The only concern I would have would be to add the language that I had in my proposed instruction of 2.06. Rather than having the simplified version after whether loaded or unloaded, it would be adding which under the circumstances in which it is attempted to be used, attempted to be used or threatened to be used is readily capable of causing deaths or substantial bodily injury, to make it consistent with the statutory definition of deadly weapon in 9A.04.110(6), I believe.

Instruction 19, again this is the—it would be acceptable version of one—if there was no lesser-included offenses being proposed. There are obviously concerns over the legibility. It does have that language in there.

On Instruction No. 20, it is the same as my special verdict instruction, which is appropriate.

Instruction—the special verdict form is the same as what I have proposed, so there is no objection to that.

The Verdict Form A would be acceptable in the absence of a lesser-included offense instruction for assault in the second degree. The Special Verdict Form [803] B and C are acceptable as written.

Now, the remaining issues are about the failure to give instructions, which relate almost exclusively to the lesser-included offense issue. I think several arguments, several thing that are important on the issue of assault in the fourth

degree is that the jury can find evidence of the—can find the crime of assault in the fourth degree based upon other acts that Mr. Recuenco admits to doing, which is primarily we have a situation where he goes into the kitchen, there is a lot of anger and argument between the parties, he then smashes the stove, either with a kettle or pipe, depending upon which evidence is believed, but clearly the stove is smashed. A very startling and angry act.

There is no dispute about the refrigerator being threatened with a pipe. Mrs. Recuenco is arguably in a state of fear and anxiety and distress at this point in time.

Mr. Recuenco admits that he was grabbing to take the telephone out of Mrs. Recuenco's hand. Mrs. Recuenco doesn't testify so much about that issue and she talks about the cord being pulled out of the wall, which might support something different, but based on Mr. Recuenco's testimony, he was attempting to grab the [804] telephone out of Mrs. Recuenco's hands, attempted to do so, unsuccessfully.

Mrs. Recuenco kept Mr. Recuenco backed up and prevented him from actually taking the telephone out of her hands. This is physical contact directed towards Mrs. Recuenco, which certainly any kind of harmful or offensive touching under the statute is considered to be an assault in the fourth degree.

Certainly it is offensive, at the very minimum, to have an object taken out of your hands that you have proper possession of, to be grabbed at. Certainly there could even be an apprehension of harm or bodily injury from that. At any rate, it is a very offensive form of touching. It is something that Mrs. Recuenco avoided, retreated from, trying to prevent the telephone from being ripped out of her hands, after which Mr. Recuenco, being unsuccessful in doing this, ripped the cord out of the wall.

Certainly if the State is going to argue and obviously the Court is focused on the firearm issue, obviously based on Mr. Recuenco's testimony, there would not be any assaultive act with the firearm, but there is an assault to that with the action of going after Mrs. Recuenco and attempting to admittedly get the telephone out of her hands.

[805] Certainly even under the State's testimony, it doesn't particularly contradict that, even though it is happening at a different point in time. Mrs. Recuenco's memory is of Mr. Recuenco pulling the phone cord out of the wall, and her testimony doesn't contradict that that assaultive act could have happened, and Mr. Recuenco is entitled to have under that an instruction on assault in the fourth degree.

Certainly had there not been a firearm involved and the State not been focused on proving a second degree assault, it would be a very logical charge to file for somebody attempting to rip a phone out of somebody's hand.

The issue of aiming the firearm, obviously Mr. Recuenco doesn't testify about doing anything with the firearm that would remotely resemble pointing it at Mrs. Recuenco.

On the other hand, Mrs. Recuenco does testify about the firearm being pointed at her, and simply to a large extent that would be somewhat of a disbelief of part of the elements, but if there is no fear, if there is no intent to inflict fear upon Mrs. Recuenco, or no apprehension of fear on Mrs. Recuenco, then there would be no assault through the firearm being pointed at her.

Certainly that would constitute aiming a [806] firearm under the statute. Mr. Recuenco certainly didn't testify as to any intent to cause any fear on Mrs. Recuenco of being assaulted with a firearm. And Mrs. Recuenco's fear of that, certainly it could be—they could find there wasn't all that much fear based on the fact she didn't say anything when the gun was pointed at her, other than wanting to call the police,

allegedly, and how even after that she didn't have a great fear of the firearm, since according to her own testimony she took it out of the filing cabinet, unholstered, and showed the police officer how the gun was pointed prior to handing it to the police officer.

So certainly even based upon the state's evidence, the jury might not find proof beyond a reasonable doubt of the greater offense of assault with a firearm in the second degree. And the instructions for lesser-included offenses, if the greater included offense is not proved beyond a reasonable doubt, that the jury considers lesser-included offense.

The issue of brandishing or of display of a firearm, Mr. Recuenco testified that he didn't believe that Mrs. Recuenco saw the firearm. Certainly that is his honest opinion, that she did not see it. In fact, he doesn't think she could have seen it, but clearly if Mrs. Recuenco's testimony is believed, she certainly [807] saw the firearm being pointed in some menacing kind of manner, something that caused her alarm.

So there is the unlawful display that is available, just like in *State v. Workman*, that it was a proper lesser-included offense for the crime of armed robbery. The defendants in that case were armed with a rifle and certainly allegations that they had pointed the rifle at somebody and tried to rob them, and the people—the testimony, of course, denied that.

And the Supreme Court in *Workman* said that the evidence in this case clearly supports an inference that the defendant Hughes was carrying a firearm in a manner warning alarm for the safety of others. And that the defendant Workman had handled the gun. So even though he might be guilty of something greater, there is certainly—certainly would support that. The supreme court said surely circumstances of people armed with a rifle intending to exit a robbery would warrant alarm for safety of anyone who might happen to be nearby.

And certainly if Mr. Recuenco, if he pointed the gun at her, it would warrant alarm for her safety, if he was—under the circumstances, you have to keep in mind, listen to this, she has been pretty much scared a lot by the stove being broken, by the [808] refrigerator being threatened, and, under Mr. Recuenco's testimony, the phone ripped out of the wall. So if she wanted to call the police, certainly one would think she is afraid. And then she—he goes—even going to put the gun away, she knows where the gun is.

Regardless of whether she knew the gun was on top or inside of the cabinet, she would know that that is where the gun is kept. She sees him going towards the gun. He has done a lot of things to frighten her, scare her. She already tried to call the police. She admits she saw him go over there. He didn't check and see whether she was watching or anything. He doesn't know what happened afterwards, but she admits she saw him going over there.

It seems—and he said an expletive about the gun and goes to get the gun. It is certainly something, even if he just put the gun away, even if she didn't necessarily see exactly what he was doing with it, if she even saw him take the gun and put it inside of the filing cabinet, it could be something that could reasonably under these circumstances warrant an alarm for her safety and well-being, because that could be a very scary situation. If it was handled in some manner differently, that would also be scary.

[809] I definitely think the assault in the fourth degree and the unlawful display of a weapon would be supported and probably the aiming as well, Your Honor.

THE COURT: Thank you, Mr. Pope.

Mr. Kimball, do you wish to respond with regard to argument concerning the lesser?

MR. KIMBALL: No, Your Honor, only to say that I think under the *Workman* analysis the Court has accurately evaluated the propriety of including either of those two instructions. I believe that the *Workman* analysis boils down to whether or not in committing the higher offense you necessarily have to commit the lower, and I would argue to the Court that clearly that, given the standards, that that is not the case here. They are not lesser includeds. And I would agree with the Court's analysis. And that is all I have.

THE COURT: The defendant's objections are denied.

First, let me begin with the assertion that the copies are too light. As I indicated, even without darkening them, I have no trouble reading them. And we will darken up the copies that go to the jury, in any event.

With regard to Instruction No. 9 and defense [810] counsel's objection, the comments to WPIC 206 and 206.01, the objection is not that the deadly weapon should not be defined for the jury, but the objection is that the more complicated 206.01 definition should be given.

However, the WPIC comments instruct that if the only weapon involved is a firearm that the simplified definition of deadly weapon should be used, and that is WPIC 206. And indeed the Court is giving only the more simplified version, since no other weapons are the subject of this trial, other than a firearm.

With regard to Instruction 12 and defendant's objection, counsel makes a distinction between the definition instruction, which is correct. It gives the entire definition of interfering with a domestic violence—interfering with domestic violence. However, the to-convict instruction instructs them only as to the 911 emergency communication. It is that instruction, the to-convict instruction, that governs what elements the jury must find in order to convict the defendant.

Therefore, the definition instruction is an accurate statement of the law. That is the definition, and read together with the to-convict instruction, [811] which is Instruction 14, that instruction specifically tells the jury what the elements are that the state must prove beyond a reasonable doubt. And it only involves—that is Element No. 3 of Instruction No. 14—it only involves preventing or attempting to prevent the victim from calling a 911 emergency communication system. Therefore, 13 and 14 both read together are an accurate statement of the law and does not mislead or confuse the jury.

With regard to Instruction No. 18, again, the defense wishes to propose a more complicated instruction for deadly weapon, 206.01. The Instruction No. 18, which states and discusses the purpose for the special verdict and the requirements that the jury must find for a finding of a deadly weapon to enhance the sentence in this case is a correct statement of the law and does not suggest that 206.01, the more complicated definition for deadly weapon, should be substituted. 18 is a correct statement of the law. And read together with all of the instructions, as the jury will be instructed to do, is a correct statement of the law. It is clear and it is not confusing.

With regard to counsel's very lengthy argument as to the propriety of a lesser-included instruction, it appears that counsel is arguing that [812] Assault 4, aiming a weapon, and, more specifically, that Assault 4 somehow is a lesser included of the charged offense of interfering with a domestic violence reporting.

The state has chosen to charge that offense rather than the Assault 4 arising from the struggle and the disconnecting of the telephone. *Workman* governs this Court's analysis of whether or not a lesser-included instruction should be given.

Let me begin with aiming a firearm. Pursuant to RCW 9.41.230, by its terms, the statute provides that it only applies

to conduct not amounting to a violation of Chapter 9A.36, which deals with assaults and physical harm, so that aiming a firearm cannot be a lesser included, and is not appropriate to be given in this case.

With regard to the assault in the fourth degree, assault in the fourth degree could be a lesser included or it could be and/or a lesser degree of assault in the second degree. However, this Court need not reach whether it satisfies the legal problem of *Workman* because it cannot satisfy the factual prong. *Workman* requires that there be some facts that support that only the lesser-included offense or the lesser degree offense of assault 4 be inferred from the facts. [813] There is simply not a scintilla of evidence that supports the giving of assault in the fourth degree as either a lesser included of assault in the second degree with a deadly weapon or a lesser degree.

Under the theory that it is a lesser included or a lesser degree, the law in *Workman* requires that there be facts to support the lesser included or the lesser degree. There are numerous cases which I cited to counsel that require that the jury simply not disbelieve the state's case, but that there must be a affirmative proof that only the lesser-included offense or the lesser degree offense was violated.

In this case, though the record speaks for itself, the only evidence of an assault that has been charged in this case is the pointing of a weapon at the victim in this case. There is no evidence that a weapon was displayed. In fact, the defendant testified that the only time the gun was in his hand was when he took it from his car and placed it in or on top of the file cabinet that this jury heard so much about, and the second time he touched the gun was when he realized during the course of the argument in the kitchen that the gun was on the file cabinet in open view and that he was worried that the police were on their way, and therefore went to the file cabinet, picked the gun up, [814] and placed it in a drawer.

He in fact testified that the victim was not even in the room at any time when he touched the gun.

In light of the defendant's own testimony, there simply are no facts that support the lesser included or the lesser degree crime of assault in the fourth degree.

The same is true of displaying the firearm, which is requested by the defense, as well. *State v. Karp*, 69 Wn. App. 369, a Division II, 1993 case, review denied by the supreme court, is almost on point. In that case the defendant admitted that he pointed a gun at the victim, unlike the facts in this case. However, the argument is the same. He argued he was entitled to the lesser of unlawful display because he pointed his gun.

The only facts in this case are that the defendant pointed the gun at the victim. The court stated that although the defendant's conduct also supports an inference that he violated the unlawful display statute, the evidence does not support an inference that only that statute was violated, and therefore the defendant is not entitled to a lesser included. It is simply not enough for the jury to disbelieve the state's evidence. There must be some [815] evidence that supports the inference that only the lesser was committed.

See also *State v. Chartes*, 126 Wn.2d 353 (1995).

Counsel, please be prepared tomorrow morning at nine a.m. to begin closing remarks after I have instructed the jury.

Thank you.

MR. POPE: Your Honor, I understand the Court's ruling on that. I don't think it would change the Court's analysis. Just for the clarity of the record, I would argue that the scuffle over the telephone could have been an assault in the fourth degree as a lesser included to the assault in the second degree, not particularly as some alternative to interfering with the domestic violence reporting, although certainly you could

commit both at the same time. But it would be—I argue that that would be a lesser degree to second degree.

THE COURT: Understood.

MR. POPE: And I believe I made a record about all of the different special verdict forms and the definition and instructions for the three lesser-included offenses without having to recite those in detail. That is accepted for the record and I don't [816] have to go through and say what those instructions would have been because I think it is pretty obvious what they would have been.

THE COURT: Thank you, counsel. We will see you tomorrow at nine.

(The Court is recessed.)

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

EXCERPTS FROM VERBATIM REPORT
OF PROCEEDINGS

DEFENDANT'S MOTION TO VACATE

FEBRUARY 24, 2000

* * *

[902] THE COURT: Mr. Pope, please address the second ground.

MR. POPE: Okay. I guess the main new argument is over the jury instructions that were requested and not granted. The first issue is over the firearm. The definition of firearm under statute 9.41.010(1) being a weapon or device from which a projectile my be fired by explosive such as gunpowder, that is a statutory definition of firearm. That is the instruction provided in the WPIC. It is important for that to be given so that the jury knows what a firearm is. It is an element of the offense.

In this case, the states tries to say it is not an element because you could commit assault in the second degree by some means other than deadly weapon or use some deadly weapon other than a firearm.

In this case, the allegation and the basis on which this case was tried was under the theory of firearm. Therefore, if it is a deadly weapon you have to find what a deadly weapon is. Apparently the statute says it can be interpreted as a firearm being a [903] per se deadly weapon, although we would urge the more expansive definition of firearm. But there is no—but in this case, the firearm has to be defined. If it was a deadly weapon—if it was a knife you would have to give a more expansive definition of deadly weapon. It has to be defined what it is, just like any other offense.

Number two, the—there is no—the weapon was admitted. There was something admitted into evidence. The fact that—but there is no testimony or evidence about it being able to fire a projectile by means of explosive such as gunpowder.

Now, the state tries to say that a non-working firearm could also be a basis for this offense, and certainly it can be, but there would have to be some evidence about this being something that could at least theoretically fire something, whether it works or not. There is no testimony about it.

Simply because a piece of evidence was admitted, that—obviously it was without objection. There wasn't a basis to object to it, really. Simply because it is admitted into evidence, if there is no testimony or evidence about it being something that is designed or capable or at least theoretically capable of firing a projectile by explosive or something like [904] that, then there is no evidence to support that, that it is a firearm.

Number 3, the deadly weapon, we need to be properly defined. We talked about that in more detail earlier, so I won't go into it as much now, but especially if there is not a legal definition of firearm, basically what we have done, deadly weapon is something that is generally if it is under the circumstances used, attempted to be used or threatened to be used, readily capable or at least apparently capable of causing death or substantial bodily injury.

We have cut that out, cut it down to firearm, and then the Court did not even give a definition of what a firearm is. So maybe with a fuller definition of firearm the error would not be prejudicial, but you cut the meat out of deadly weapon and you cut the meat out of firearm, so that the jury doesn't have anything to go by in this situation.

THE COURT: Five minutes.

MR. POPE: Then you have number four. We had the definition of pistol under the statute 9.41.01(2), under WPIC 133.50, which we also requested be given, because we have firearm, and also the pistol. And the instruction for the deadly weapon special verdict talked about pistol or firearm or other weapon, and we [905] did not give the definition of pistol in this situation.

The issue of the lesser-included offenses, I think that especially the assault in the fourth degree, I don't think that the Court gave enough—the Court talked a lot about aiming the firearm and unlawful display of the weapon, but the assault in the fourth degree when Mr. Recuenco was attempting to grab the telephone set or cord from Ms. Recuenco, the state tries to say Mr. Recuenco gave a lot of inconsistent statements about that.

They simply—it is more like the state disagreeing with what Mr. Recuenco said. Obviously the jury may disagree with a lot of what he said, too. But he did say he was struggling with her over the telephone. The state obviously tried to get minute detail out of Mr. Recuenco, just like I did with Mrs. Recuenco. But certainly under those circumstances this would have put—either been an attempt to do an unlawful touching or grabbing of Mrs. Recuenco by grabbing something out of her hand or putting her in fear of receiving an unlawful touching or battery, both of which are assault in the fourth degree, which is a lesser offense to assault in the second degree.

Clearly Mrs. Recuenco would have been [906] frightened very traumatically by this. There is the stove being smashed. There is testimony from the daughter at least about the glass flying all over the place, and some dispute about how the stove was smashed. No dispute that Mr. Recuenco got a pipe and threatened to smash the refrigerator as well.

Certainly these events happening after that, it would have been quite reasonable for Ms. Recuenco to be in fear of either being battered by Mr. Recuenco when he was grabbing the phone or Mr. Recuenco was certainly attempting to get the phone out of her hands, which is taking something out of somebody's hands is a battery. Attempting to do that, also it is assault under the criminal definition. Attempting to do that is assault. That instruction should definitely have been given.

The aiming of firearm, I guess it depends on the question of whether it is an issue of whether some of the state's evidence being disbelieved or being a reasonable interpretation that could be gotten out of that evidence.

The unlawful display of a weapon, you simply have to handle the weapon in such a manner that causes alarm for somebody's safety. And whether or not Mrs. Recuenco—Mr. Recuenco didn't think she could see it, [907] when—according to his testimony, but he would have been able to—certainly she saw him if his testimony is believed, she would have been able to see him run or walk towards the filing cabinet where the gun was on top and do a motion that would be handling the gun.

Whether or not she could actually see the gun in his hand or not would be irrelevant. It would certainly be quite frightening and alarming to somebody under those circumstances if they saw Mr. Recuenco doing something that was obviously handling a gun.

You have it on top of a filing cabinet, going towards the filing cabinet. Whether they see it or not, they see that, and handling it, opening the drawer up, things like that, and that would be quite alarming to Ms. Recuenco's safety.

Certainly according to his testimony, after this happened, she ran into the bedroom, which will be consistent with her being frightened by all this. So that the one definitely should have been given because it doesn't even require a disbelief in

the—simply disbelieving the state's testimony, it is a reasonable inference out of what Mr. Recuenco testified to that, that would have been quite frightening to Mrs. Recuenco, especially under the circumstances where he smashed the stove, glass all over the place, threatened [908] to smash the refrigerator, and yanked the telephone cord out of the wall after a struggle or attempted struggle over the telephone. That would certainly be alarming to see him doing anything that looked like handling the firearm.

Those instructions should have been given, Your Honor, and certainly the definition of pistol and firearm we requested should have been given, especially in light of the abbreviated version of deadly weapon that simply said firearm without defining anything about what a firearm is.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Pope.

Mr. Kimball, briefly, please.

MR. KIMBALL: May it please the Court, the defense asks Your Honor to vacate the judgment based on Criminal Rule 7.4 and 7.6.

THE COURT: Can you speak up?

MR. KIMBALL: Under 7.6 there is no basis on this record to find that a substantial right of the defendant has been materially affected. Counsel urges the Court to find that WPICs 2.06, 2.07 and 2.10 should have been given to the jury. A reading of the comments to those WPICs clearly provides guidance to trial attorneys and the Court under which forms of the [909] instruction should be given to the jury.

When you read the comments and you read 2.06 it talks about when a firearm is the only weapon alleged to have been used in committing the assault that you go to 2.06.01, which is what the Court did.

Similarly, 2.07, the supreme court committee which drafts the standard instruction advises the Court and counsel how to handle that situation. And again the Court followed that directive. It used 2.07.02.

The confusion comes in what counsel asked that 2.10 be given. If you examine 2.10, it defines firearm. Clearly the WPIC comment note on use provides that this instruction should be used when there is a special allegation that the defendant was armed with a firearm, and in fact the title to that WPIC reads firearm—the WPIC 2.10.01 reads that firearm definition for sentence enhancement special verdict shall be used when a firearm is known.

The elements that the Court has defined for the jury were an assault in the second degree. The method under which the state is alleging and the jury found the assaults committed was by use of a deadly weapon.

The Court was obligated to define deadly weapon, which it did, using the WPIC instruction. [910] There is no—in the crime charged and the enhancement the state alleged, there is no elements of a firearm. The element is assault with a deadly weapon.

The WPICs take great care in not requiring the Court when it provides instructions on assault in the second degree, deadly weapon, to define firearm. In fact, if you read the comments 2.10.01, and comments to 2.07 and .06, it distinguishes when the special enhancement is strictly a deadly weapon from when the special enhancement is firearm. There no obligation for the Court to define firearm in the manner in which Mr. Pope is asking.

Furthermore, there is no testimony and no issue on the record before the Court that the operability of the firearm was ever disputed. The officer that testified—I believe Officer Lucas testified as to the nature of the firearm, how it worked. There was no objection when it was admitted into evidence.

Furthermore, it is not a case where the trier of fact, in this case, the jury, was asked to decide whether or not a crudely made zip gun or a pen gun or older clearly questionable rusty or by appearance inoperable gun was used. The gun that was used was, even by counsel's own record, oiled, had all the [911] indicia of operability. And counsel clearly waived that objection when he failed to object when it was admitted into evidence.

On the issue of lesser-included instructions, the Court did provide to the jury instructions on assault in the second degree-deadly weapon. There is no basis for the Court to provide to the jury unlawful display of a weapon. There was no basis also for the Court to have been obligated to provide to the jury pointing a firearm.

To be sure, if you point or aim a firearm at a person, that can be one of the bases under the legal prong to constitute assault in the second degree. But under the *workman* analysis, this argument fails, because there is no basis, no argument on the record that only the lesser-included offense was committed. That goes for pointing and aiming a firearm, unlawful display, and Assault 4.

The record is, I think, bountifully sufficient with testimony and evidence that not only was a firearm pointed, but it was pointed at Ms. Recuenco's face out of anger, that she was placed in apprehension and fear that she might be shot. That constitutes assault in the second degree, deadly weapon. It is not simply pointing or aiming a firearm.

[912] The fact that an assault is the precursor to assault in the second degree, Assault 4, counsel argues that Ms. Recuenco may have been placed in apprehension of fear, given there is a potential struggle for the phone. Clearly the record did not reflect that there was a struggle. Mr. Recuenco admitted to the police he simply yanked the cord from the wall. There is a

real material issue of dispute as to if the struggle in fact ensued.

The bottom line is it is not merely enough that the Court or jury be asked to disbelieve the state's evidence. There was a compelling record made to support to assault in the second degree deadly weapon. There is not a basis to find that only lesser includeds were committed by the defendant.

I would ask the Court to affirm or not question the judgment of the jury, not vacate the judgment. No rights of the defendant have been substantially affected by this Court's decisions. I would ask Your Honor to deny the motion and proceed to sentencing on the charge Mr. Recuenco was convicted of in mid January.

THE COURT: Thank you.

Mr. Pope, five minutes, sir.

MR. POPE: Very briefly, Your Honor, the [913] firearm is a element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury.

The Instruction No. 9, the Court said the term deadly weapon includes any firearm, whether loaded or not. The word firearm was not defined for the jury. Instruction No.— that related to assault in the second degree, one of the things according to that.

Instruction 18, the special verdict instruction, it has—the second sentence says pistol, revolver or any other firearm as deadly weapon, whether loaded or unloaded. In that case, the terms pistol and firearm are statutory in terms with a specific definition and statute under 9.41.010(1) and (2), which are important to be given. For both of those reasons, the firearm and the pistol should have been defined to the jury.

It is a element of the offense. It is an element of the special verdict as defined. First of all, you start with a deadly weapon, under statutory definition of second degree assault,

and there is another statute that talks about the definition of deadly weapon. It includes firearm, whether loaded or unloaded.

And then you have to go to the definition of [914] a firearm to find out what a firearm is. That is an element. Firearm is something in which a projectile can be fired by gunpowder or explosive. That becomes a part of the definition of the element of deadly weapon. And then deadly weapon is part of the element of assault in the second degree committed by a deadly weapon. This is an element of the offense.

Similarly, both pistol and a firearm are elements of the special verdict instruction as given on Instruction No. 18.

The other thing is I obviously argued for more expansive definition of deadly weapon under the statute. I think perhaps if it would not be so prejudicial if the statutory definition had been given, and the statutory definition of pistol for the special verdict, but certainly in the absence of that, there would need to be the full statutory definition of deadly weapon and not just what apparently appears to be an abbreviated per se version about firearm, unloaded or loaded, especially without a definition of firearm.

The issue of the weapon in this case, obviously whether we—obviously we didn't raise that as an issue per se in the sense of developing evidence on there because it wasn't in our interest to do so. [915] But there was no evidence given that this weapon either could or was at least designed to fire a projectile by explosive such as gunpowder. Obviously the question of whether it actually worked or not would be irrelevant under case law, but whether or not the weapon as designed and intended could fire a projectile, not just this one in question but anything like that, there was absolutely no evidence given on that.

So the firearm element is not satisfied, especially since we relied upon the per se definition of firearm. If we used a

more expansive definition, it could have looked scary, but in this case the jury was instructed only on firearm. That is the law of the case and there is no evidence about the statutory definition of firearm under 9.41.010(1).

The lesser-included instructions, all I can say is the state talked about how there is a material issue of dispute over the struggle for the telephone. Right there, the state is admitting that there is a material issue of fact as to the struggle over the telephone. Certainly, Mrs. Recuenco didn't talk much about that.

Mr. Recuenco talked a great deal about that. His testimony creates a material issue of dispute, and all there has to be for a lesser-included instruction [916] is a genuine issue of material fact through—some of the cases talk about it being a more permanent thing. In this case, Mr. Recuenco did provide testimony about the struggle over the telephone, and certainly all of the other circumstances could support that.

The—I already said what I said on the display of weapon. I think that that would definitely be a very strong case for a lesser-included instruction on that issue.

The question of the aiming a firearm, I guess that would be one of my weaker points about lesser-included instructions. But I think that would be appropriate as well.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Pope.

The issues raised by defense counsel were issues that were argued extensively before this Court prior to the Court instructing the jury. For the same reasons I articulated then, I adopt now and rely on the state's submissions as well. The motion is denied. The jury was properly instructed.

Let's turn to sentencing.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

[Caption Omitted In Printing]

EXCERPTS FROM VERBATIM REPORT
OF PROCEEDINGS

SENTENCING HEARING

FEBRUARY 24, 2000

* * *

[917] THE COURT: Mr. Recuenco, if you will come forward for sentencing, please.

MR. KIMBALL: Has Your Honor received the presentence report from the Department of Corrections?

THE COURT: I have, and I read all the materials.

MR. KIMBALL: This is the sentencing on Arturo Recuenco. The charge he is being sentenced for before Your Honor is assault in the second degree with a deadly weapon. He is also being sentenced on two misdemeanors on which he was convicted by the jury, Counts 2 and 3, interfering with domestic violence reporting, and malicious mischief in the third degree, respectively.

The offense, the felony offense, Your Honor, is a Level 4. Mr. Recuenco does not have an offender's score. It is zero. His range therefore would be three to nine months, with a maximum term of ten years and/or 20 thousand dollar fine. The deadly weapon enhancement, however, is a 36-month enhancement by statute.

The state, Your Honor, is asking this Court [918] to impose the low end of that three to nine months and to follow the requirements of the mandatory enhancement for 36 months, giving Mr. Recuenco 39 months on Count 1, Assault in the Second Degree With a Deadly Weapon.

On the remaining two counts, Your Honor, I am asking this Court to suspend time on those two. Count 2, the interfering charge, is a gross misdemeanor with a maximum of a year in the county jail and a maximum fine of five thousand dollars. I am asking Your Honor to suspend that time.

Count 3 is a simple misdemeanor with a maximum of ninety days and/or a one thousand fine. I am asking the Court to suspend that time as well.

I am also asking the judge—one second, Your Honor.

I asking very importantly for the Court to order no contact with Amy Recuenco. And this issue has been visited prior and since the jury verdict. I think counsel and I were before Your Honor to discuss amendment to the no contact order. I would simply ask that the Court sign off on an order as condition of sentence which carries over the same conditions we agreed to.

Your Honor imposed, I guess, a month or so ago that he have no contact with Amy Recuenco, contact only [919] with the children per the family order, which was telephonic contact only twice a week.

I believe Mr. Pope could help on this. I believe it was Tuesday and Thursday.

MR. POPE: That is what the order provided.

MR. KIMBALL: That is what Your Honor signed off on to again impose.

The Court obviously recalls. The trial was fairly recent. And I won't go into the facts of it at all. I think this is a very potentially life-threatening situation for Amy Recuenco. I think you have a situation where you have a man who when angry is violent, and his violence is manifested in, I would argue, a psychological cycle of abuse regarding Amy Recuenco, that possessions of her were broken, that she was

yelled at, she was put down. And as she said to the jury, she had no dignity or self respect in this relationship.

The concern the state has is that you have a man who is angry, smashes items in the house in the presence of his children, then has a handgun.

Even if you take the most bare bones admissions by the defendant, a handgun had been sitting out at his house where children could access it. And you have his kids hiding in a bedroom, not knowing if [920] their mom will be shot when the parents are having this argument. It is a extremely volatile situation. I think the jury agreed with that fact and the dynamic.

I would ask the Court to impose—I think is obligated to impose the 36 months. And I think the state is being generous by not asking for anything higher on the misdemeanors or high end of the Assault 2 range. 39 months should be imposed. This is a serious offense. It is a life-threatening situation. And the jury agreed with that.

That is all I have, Your Honor.

THE COURT: Mr. Pope.

MR. POPE: Well, basically on the sentencing, on the basic sentencing range, I think three months would be appropriate for the basic part of that. That is the low end of the range the legislature provided. There is obviously many different ways in which you can commit assault in the second degree with a deadly weapon. In this case, it was simply aiming and a threat, as presented to the jury. There was no actual threat by Mr. Recuenco to use the firearm, no attempt to actually use the firearm.

Had those kind of things happened, it would still be assault in the second degree with a deadly weapon, if that is what happened.

[921] He does have no criminal history, which obviously a zero offender's score is presumed in the standard range, but there is no history whatsoever. He's had the same job for the last 18 years, been very stable, been otherwise, at least outwardly, a very nice person.

It certainly was unfortunate he had the marital problems he and especially the wife has been talking about. But that would be an appropriate three months at the low end of the standard range for the basic part of the sentencing.

The issue of sentence enhancement, looking at this, this case, 36 months would have applied if the state alleged and proved the use of a firearm and there had been a jury verdict about a firearm on the special deadly weapon verdict.

In this case, however, the state alleged and proved a deadly weapon without specifying a firearm. The jury verdict returned was the general deadly weapon verdict under WPIC 1.90.01 and not the firearm special verdict under WPIC 1.90.02.

The instruction given for the special verdict was a deadly weapon special verdict instruction under WPIC 2.07.02, and not the specific instruction for a firearm special verdict under WPIC 2.10.01.

[922] The case law under *State v. Workman*, one of the things about that case is that the prosecutor has the discretion whether to add special enhancements for firearms and/or deadly weapons, with quite a bit of latitude in that situation.

The prosecutor can charge the basic assault in the second degree with a deadly weapon if they feel that a three to nine month sentencing range is appropriate. They can add a deadly weapon thing to it, which would make it a 15 to 21 months. They can specifically allege a firearm as a special allegation, which makes it 39 to 45 months.

In this case, the state chose the intermediate level of alleging a deadly weapon without making the specific firearm allegation. The state—in addition, the state, of course, did not propose a firearm special verdict or a firearm special instruction. They didn't even propose a deadly weapon special instruction for the verdict, but the Court did supply that. And that was how it was tried to the jury and that is what Mr. Recuenco has been charged and convicted of.

Workman makes it very clear that any allegation of firearm or deadly weapon has to be alleged in the information.

[923] There is also *State v. Luwa* (phonetic) that says that the state must prove beyond a reasonable doubt every essential element of the allegation that triggers the enhanced penalty.

In this case, the state has chosen simply a deadly weapon enhancement rather than the special enhancement for the firearm.

Under this circumstance, the 12 month enhancement would be appropriate as a matter of law.

Now, the issue of the misdemeanors, obviously the sentences for those should be served concurrently with the felony sentences.

I took a little bit different approach than the prosecutor. I was obviously—I usually like to respond to what the department of corrections has to say. And on the malicious mischief in the third degree, I would recommend somewhere between zero and 15 days, to be concurrent with the felony, serving the felony sentence.

Had he only done that, it would have not been such a major thing, although it was rather alarming the way he did damage the stove, although it was something that he had at fifty percent interest in and he did it when he got angry over a dispute about the cooking.

The interference with domestic violence [924] reporting, I believe that a sentence of between 15 and 30 days, concurrent with the felony sentence, would be appropriate. Obviously the Court has to take some look at what offense was being interfered with, which obviously was a serious offense.

On the other hand, after doing this, according to—especially according to the theory under which Mr. Recuenco was convicted, there was no further violence or threats or any other law violations after Mr. Recuenco pulled the phone out of the wall. So that make it less serious than some other things, because obviously the legislature had in mind that somebody could go—after pulling the phone out of the wall, they might beat up their significant other or do further criminal acts after the contact with the police is denied.

In this case there was no further criminality by Mr. Recuenco after the telephone was taken out of the wall.

There are also issues of domestic violence treatment and the no contact order. I think in the no contact order it should be with Mrs. Recuenco. I think that is best handled with this Court—by being imposed by this Court and by being something if they ever want to change for whatever reason they would have [925] to come back in this Court and do that.

The issue of the children, however, there is a domestic violence protection order in place. Presumably, one of the spouses will file a dissolution, or perhaps a legal separation action, depending on how—whatever they chose to define that as, which is going to develop a parenting plan for the children, which is obviously going to take into account whatever incarceration Mr. Recuenco has and whatever happens after that.

I believe that this issue of contact with the children should be something that he should follow the family court orders on. Presently there is nothing with a supervised contact via telephone—actually, contact by telephone. And how can he

do that from prison? It will make the logistics rather interesting.

Obviously as a domestic relations proceeding goes further there could be some provisions for whatever in the future.

It may be appropriate for Mr. Recuenco to write letters to his children, because contact by telephone from prison can be very difficult. They don't like to do three-way calls.

Mrs. Recuenco will probably not be accept the charges. Whether his relatives want to fund it is a [926] good question. But in all likelihood the main method of communication while in prison would be by writing letters. He certainly should not be prohibited from that in prison. Or if the prison allows visits and somebody is willing to take the children there, then that certainly should not be prohibited either, because that would be something that would be certainly under supervised conditions, as all of those situations are.

After he is released, then I think things would be looked at further. He would probably have a modification of the parenting plan at that point to take into account the fact that he is out of prison.

The domestic violence treatment is probably something better left to the family court proceedings, because it is mainly going to be issues over what the terms and conditions of Mr. Recuenco having contact with his children after release from imprisonment.

Certainly if there is the treatment available in prison, hopefully he will avail himself of that, although our corrections system tends to be somewhat short on treatment and long on punishment.

So that is what I have to say, Your Honor.

THE COURT: Thank you, Mr. Pope.

Mr. Recuenco, this is your opportunity to address the Court before I impose sentence. You don't [927] have to say anything unless you wish to do so.

MR. RECUENCO: Your Honor, I would really like to have contact with my kids when I am incarcerated. I do love them very much and I really want to have contact with them, basically. If they are available, some relatives of mine could pick them up and take them to wherever I am for visit.

THE COURT: Is that all?

MR. RECUENCO: I would abide by any rules you are going to put on me, Your Honor.

THE COURT: Thank you.

Mr. Pope, are there any objections to the recommended conditions that are set forth in Appendix H by the Department of Corrections? They are all permitted by statute.

MR. POPE: Appendix H, I guess on numbers—obviously the ones that are mandatory are mandatory. The number 10, 11, and 13 are fairly standard in something like this.

THE COURT: So, no objection?

MR. POPE: Number 12, I think, not to say there is necessarily an objection in principle to Mr. Recuenco having domestic violence treatment, I just think it is something that is better left to whatever the family court decides.

[928] THE COURT: Thank you.

Is there any restitution?

MR. KIMBALL: The state is not asking for restitution, Your Honor, I would waive that.

THE COURT: As to Count 1, the Court will impose 39 months. The Court has no discretion but to impose the statutorily mandated term with regard to the deadly weapon enhancement.

As to Count 2, which is a gross misdemeanor, the Court will impose a year in jail and suspend all of that time.

As to Count 3, the Court will impose 90 days and suspend all of that time.

As to the misdemeanors, Counts 2 and 3, there they are to run consecutive with the felony and consecutive with each other.

The Court will impose all of the conditions set forth in Appendix H, the judgment and sentence, as recommended by the Department of Corrections.

The Court does not waive any of the mandatory conditions.

The Court will impose a five hundred dollar victim penalty assessment under the felony only. Interest is waived on that amount. And by statute there will be a one-year term of community placement.

* * *